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SEP 14

Supreme Court of the United States

October Term, 1935

No. 270

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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THOMAS E. WHITE,
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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

Statement of Facts.

The statement of facts contained in the petition does not contain certain material facts which are necessary to a determination of the questions presented. For that reason, we supplement the statement contained in the petition with the following facts.

The building loan agreement provided for the delivery to petitioner of a bond and mortgage in the sum of $6,650,000, which was to mature on December 16, 1930, on the same date fixed for the completion of the building, and this bond and mortgage was executed and delivered (R. pp. 569, 592, 678).

Nowhere in respondents' bond is there any provision guaranteeing the performance of the provisions of the bond and mortgage. Respondents' bond guaranteed only the performance of the provisions of the building loan agreement (R. p. 596).

At the same time that respondents' bond for the completion of the building was furnished, the petitioner received from a third party, Lefcourt, pursuant to the provisions of the building loan agreement, a guaranty of performance of all the terms, conditions and covenants of the bond and mortgage, including the payment of the principal sum and interest (R. pp. 571, 679, 680).

On the date fixed for the completion of the building and the satisfaction of the mortgage, there was a default on the bond and mortgage (R. pp. 19, 722). Because of such default, a foreclosure action was started by petitioner two days later, on December 18, 1930 (R. p. 19). On or about January 6, 1931, the borrower signed an agreement giving the petitioner possession of the premises (R. p. 725). Judgment of foreclosure and sale was made and entered on January 19, 1931 (R. p. 19). The property was sold for $6,000,000 on March 17, 1931 (R. pp. 19, 20). A deficiency judgment was entered on April 3, 1931 (R. p. 20).

The petitioner claimed the building was actually completed on October 1, 1931. No evidence was adduced by the petitioner to establish what would have been a reasonable time within which to complete the building after the default. The respondents, however, adduced uncontradicted testimony that the work done to complete the building after the default could have been done in a period of from four to eight weeks (R. p. 436). The petitioner claimed interest, taxes and insurance premiums for the whole period from the date of the default up to the date it claimed the building was actually completed (R. pp. 18, 19).

The only defaults claimed in the complaint were defaults in constructing, paying for and completing the building (R. pp. 13-16, Paragraphs XXI-XXVII, XXXII). Nowhere in the complaint was it alleged that there was any express obligation to pay interest on mortgage, taxes or insurance premiums, and in claiming for such items the theory was that they were damages flowing from the defaults in the completion of the building, and not from any express obligation to pay them. Paragraph XXXVII of the complaint alleged that by reason of the defaults previously mentioned, which were defaults in completion, the plaintiff had been deprived of interest on the principal of the loan, not that plaintiff had been deprived of the interest because of the failure of the respondents to comply with an obligation to pay (R. pp. 17, 18).

The Circuit Court of Appeals held that the measure of damages was the difference between the value of the building on the date of the default and the value the building would have had on that date if completed strictly in accordance with the plans and specifications (R. p. 885). No evidence was introduced by the petitioner to show the value of the building on the date of the default, or what the value would have been if the building had been completed on that date in accordance with the plans and specifications.

The Circuit Court of Appeals held that the items of omissions and substitutions claimed by the petitioner might detract from the value of the building (R. p. 882), and that such loss might be recovered (R. p. 884). The petitioner, however, introduced no evidence to show to what extent, if any, the value of the building had been diminished by such omissions and substitutions. On the other hand, the respondents adduced uncontradicted testimony that the value of the building was not lessened by the items of omission and substitution (R. pp. 359, 376, 377, 404).

In the petition (pp. 9 and 10), the petitioner speaks of interest lost by petitioner between December 16, 1930 and October 1, 1931 on $6,575,000. As a matter of fact, petitioner did not lose interest on $6,000,000 between March 17, 1931 and October 1, 1931, because it sold the very same premises for $6,000,000 on March 17, 1931.

As to the Alleged Reasons for Granting a Writ.

The first reason has no substance, because the decision of the Circuit Court of Appeals was in exact conformity with the decision of this Court in *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47. The only holding of this Court in the case mentioned is that damages were

> "the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd* v. *McCormick, supra,* p. 398—but exceeding neither the amount due on its debt nor the amount of the bond."

In this case the Circuit Court of Appeals held:

> "We think, therefore, that the measure of damages was the difference between the value of the building on December, 16, 1930, as the work had progressed, and the value it would have had on that day if completed strictly in accordance with the plans and specifications" (R. p. 882).

The second reason has no substance, because the decision of the Circuit Court of Appeals was in exact conformity with the law laid down in *Kidd* v. *McCormick,* 83 N. Y. 391. In that case the Court stated in three different places that the measure of damage was the difference in value

between the buildings unfinished and the buildings as they would have been if completed according to the contract. This is the same measure of damage followed in the *Trainor* case, *supra,* and the same measure of damage applied in the instant case by the Circuit Court of Appeals.

The third reason has no substance, because the cases cited in the petition clearly state that any damages recoverable must not be remote or speculative, but direct and immediate and resulting from the breach alleged. The breach here was the failure to complete a building. The damages claimed, to wit: interest on loan, etc., were lost because of the breach of the borrower in failing to satisfy a mortgage.

The fourth reason has no substance, because, as above pointed out, the Circuit Court of Appeals has followed the decisions in *Trainor* v. *Aetna Casualty Co.* and *Kidd* v. *McCormick.*

The fifth reason has no substance, because there was no finding of fact that interest, taxes and insurance were proper items of damage, but these items were allowed by the Trial Court as a matter of law, based upon a mistaken understanding of the decisions in *Trainor* v. *Aetna Casualty Co.* and *Kidd* v. *McCormick.*

The sixth reason has no substance, because the question is one dependent upon the interpretation of particular instruments and does not involve a question of law of general importance.

The seventh and eighth reasons have no substance, because they present a question which has been passed upon times without number, and that is whether a provision in a written instrument providing for a written waiver may be itself waived by parol.

The ninth reason has no substance, because the amount involved and the length of the trial are not among the reasons laid down for granting a writ of certiorari.

Summary of Argument.

I.

ANSWERING POINT I.

A.

The decisions of *Trainor* v. *Aetna Cas. Co.*, 290 U. S. 47, and *Kidd* v. *McCormick*, 83 N. Y. 391, do not warrant the allowance of interest on a mortgage, taxes and insurance premiums as damages caused by the failure to complete a building.

B.

Interest on the mortgage loan and taxes and insurance premiums are not recoverable as damages from the respondents, because the only default claimed against the respondents, failure to complete the building, was not a cause, either direct, natural, proximate, concurring or otherwise, of the loss by petitioner, but the sole, direct, natural and proximate cause of such loss was the default of the principal debtor on the mortgage.

C.

Interest on the mortgage loan as damages is not recoverable from the respondents because they assumed no obligation as to the principal of the loan, and interest as damages can not be recovered apart from the principal.

II.

ANSWERING POINT II.

The respondents were not liable by contract for interest on the mortgage, taxes and premiums,

because their bond did not guarantee the payment of such items. The respondents' sole obligation was to make good any default of their principal in constructing, paying for and completing the building.

III.

Answering Point III.

Whether the respondents were liable for interest on mortgage, taxes and insurance premiums was a question of law determinable from a construction of the respondents' bond, and the Trial Court made no finding of fact in respect thereof.

IV.

Answering Point IV.

The Circuit Court of Appeals was not confused in its holding that the provision in the bond for written waiver of strict performance of the building loan agreement could be waived by the parol consent of the president of the petitioner to omissions and substitutions.

V.

Answering Point V.

A provision in an instrument requiring a written waiver may be waived by parol, and the excluded evidence tended to show such waiver.

VI.

The Circuit Court of Appeals was correct in ordering a new trial.

ARGUMENT.

I.

Answering Point I.

A.

The decisions of *Trainor* v. *Aetna Cas. Co.*, 290 U. S. 47, and *Kidd* v. *McCormick*, 83 N. Y. 391, do not warrant the allowance of interest on a mortgage, taxes and insurance premiums as damages caused by the failure to complete a building.

The opposition by the respondents in the Trial Court to the allowance of interest on the mortgage loan, taxes and insurance premiums were summarily dismissed by the Court in these words:

> "The defendants' contention would seem adequately to be disposed of under the authorities cited." (Citing the above mentioned cases) (R. p. 507).

No authority was cited to or by the Court in which such items had ever been allowed. The Court depended entirely upon words used in the opinions in those two cases which were not necessary to their decision and were inserted only to show why the measure of damages laid down in those cases and which had always been previously applied was the correct and only measure of damages in such cases.

Difference in value was applied in *Trainor* v. *Aetna*, as the proper measure of damage, this Court saying:

> "Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with

> the terms of the undertaking; and this can be done here only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd* v. *McCormick, supra,* p. 398—but exceeding neither the amount due on its debt nor the amount of the bond."

In that case the plaintiff was a third mortgagee with no such rights as the plaintiff here, who was a first mortgagee. Defendant had claimed that the value of the property on the date of default was in excess of the debt to plaintiff and all prior liens and that, therefore, plaintiff could have suffered no damage. To show *why* that contention was not sound, the Court said:

> "Petitioner was then (at the default) without remedy against the property because its mortgage was not in default. It was, therefore, obliged to sit by and await the action of others over which it had no control. In the meantime, the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc., deteriorating in quality and steadily declining in value."

Because of those circumstances the Court held that the plaintiff would be compensated by giving it the difference in value. Clearly, that language is no authority for the proposition contended for by petitioner here. At best, it is a reason why the difference in value is the true measure of damage.

In the *Kidd* case the Court stated the rule to be the same as was followed in the *Trainor* case.

The reasoning used by that Court to show why that was the proper rule of damage was the same reasoning given by this Court in the *Trainor* case.

Since the *Trainor* and *Kidd* cases did not even assume to decide that interest on mortgage, taxes and premiums are proper items of damage in such a case, what the Court might have said arguendo is entitled to no weight.

Cohens v. *Virginia,* 6 Wheat. 264, 399;
Pacific Co. v. *Peterson,* 278 U. S. 130, 136;
People v. *Tax Commissioners,* 174 N. Y. 417, 447.

All the cases relied on in the *Kidd* case, all the cases relied on in the *Trainor* case, and all other decided cases on the point are unanimous that the proper measure of damages *is difference in value at the date of the default, and* that may be shown by proving the *actual cost of completion.*

The *Trainor* case cited with approval *United Real Estate Co.* v. *McDonald,* 140 Mo. 605, 612, in which it was clearly stated that the damages were to be assessed as of the date of the breach of the bond and that the measure of such damage was the difference between the value of the realty without the building required and the value of the property with such building.

To the same effect are:

Longfellow v. *McGregor,* 61 Minn. 494;
Province Securities Corp. v. *Maryland Cas. Co.,* 269 Mass. 75, 94.

Other cases substantially to the same effect are

Phillipe v. *Curran,* 218 Ill. App. 517;
Comey v. *United Surety,* 217 N. Y. 268.

The plaintiff offered no evidence of difference in value.

The petitioner has injected into its argument under Point I a theory which heretofore has not entered into the

case. It is that items of interest, taxes and insurance entered into the determination of difference in values between the building contracted for and the building at the time it should have been completed.

No claim was made either in the pleadings or on the trial that these claimed items of damage entered into the determination of difference in values. The complaint sought interest as damages because the petitioner claimed it had been deprived of interest. Taxes and insurance were claimed and allowed as items of incompletion.

Throughout the trial the respondents claimed that difference in value was the true measure of damage. Petitioner offered no evidence from which the Court could or did find what that difference, if any, was.

For the petitioner now, after its refusal throughout the case to be bound by the difference in value as the measure of damage, to attempt to bring the items claimed within the doctrine of difference in value is to present for the first time a new theory. Neither of the Courts below had presented to it or decided any such question.

Furthermore, as above pointed out, the measure of damage is fixed as of the date of the default. In fixing the damages as of that date, how can interest, taxes and insurance premiums enter into the determination when concededly the petitioner might have let the building lie forever uncompleted? It would be impossible then to determine what the claimed loss of interest, taxes and premiums might be.

Furthermore, petitioner is contending for the right to recover for the cost of incomplete items, the cost of omissions and substitutions, interest, taxes and insurance premiums although the premises as they stood on the date of the default might have been of a value in excess of the amount of its mortgage.

B.

Interest on the mortgage loan and taxes and insurance premiums are not recoverable as damages from the respondents, because the only default claimed against the respondents, failure to complete the building, was not a cause, either direct, natural, proximate, concurring or otherwise, of the loss by petitioner, but the sole, direct, natural and proximate cause of such loss was the default of the principal debtor on the mortgage.

The principal assumed two separate and independent obligations—the repayment of a loan evidenced by a bond and mortgage, and the completion of a building. A default on the first obligation was bound naturally and directly to result in loss of interest on the loan, taxes and insurance premiums. That default would be the sole sufficient, efficient cause of the loss. If there were no default in repayment, a default in completion in no event could result in the losses claimed. And again, the performance of the obligation to complete would not prevent the losses claimed if the obligation to repay were not performed. It is obvious, therefore, that there could be no connection of any kind between the failure to complete the building and the losses claimed.

The failure to complete the building under one obligation could not be the proximate cause of a loss from the failure to repay a loan under another obligation.

Milwaukee, etc. Ry. Co. v. *Kellogg*, 94 U. S. 469, 475;
Laidlaw v. *Sage*, 158 N. Y. 73, 98-102;
Wakeman v. *Wheeler*, 101 N. Y. 205, 209;
McCauslan v. *Zoar*, 131 Misc. 148, 150.

It is fundamental that a plaintiff cannot derive a greater advantage from a breach than from a performance.

Finck v. *Menke*, 31 Misc. 748;
Barnes v. *Brown*, 130 N. Y. 372, 381.

The petitioner seeks interest on a mortgage, because of respondents' failure to complete the building, which it would not have received if the respondents had completed the building.

C.

Interest on the mortgage loan as damages is not recoverable from the respondents because they assumed no obligation as to the principal of the loan, and interest as damages can not be recovered apart from the principal.

Under Point II we show in answer to petitioner's Point II that there was no *contract* obligation upon the respondents to pay interest on the mortgage loan. Here we shall consider the interest *as damages* and establish that there is no liability in respondents to pay the interest as such.

We quote from *Matter of Trustees*, 137 N. Y. 95, 98:

> "Before interest can be allowed in any case it must be by virtue of some contract express or implied, or by virtue of some statute, or on account of the *default of the party liable to pay*, and then it is allowed as damages for the default."

Sutherland on *Damages* (4th Ed.), Secs. 300, 372;
17 C. J. 814;
Cutter v. *Mayor*, 92 N. Y. 166, 170;

Southern Cent. R. R. Co. v. *Moravia,* 61 Barb. 180, 188.

All cases and authorities recognize the distinction between interest payable by virtue of contract and that payable as damages for breach of contract.

Brewster v. *Wakefield,* 22 How. 118;
Holden v. *Trust Co.,* 100 U. S. 72;
O'Brien v. *Young,* 95 N. Y. 428;
Brady v. *Mayor,* 14 App. Div. 152;
Hamilton v. *Van Rensselaer,* 43 N. Y. 244;
Melick v. *Knox,* 44 N. Y. 676.

All of the above authorities and others too numerous to cite hold that in the absence of an express contract to pay interest, interest as damages cannot be recovered apart from the principal of the debt. The interest, being only incidental and accessory, cannot exist without the debt, cannot be separated from the debt and sued for alone.

The case which approaches nearest to the instant case is the *Hamilton* case (*supra*). There the creditor sought to recover interest accruing after the maturity of the principal debt from the third party who guaranteed the interest. Here also the petitioner seeks to recover such interest but from ones who did not guarantee interest. In the *Hamilton* case the creditor sought to recover because of the contract guaranteeing the interest. If in that case interest after maturity had been sought as damages, it would be more akin to our case.

In that case it was held that in no event would the guarantor be liable for interest as damages because "he neither agreed to pay the principal, nor to be liable for the consequences of its non-payment".

United Real Estate Co. v. *McDonald*, 140 Mo. 605; *Province Securities Corp.* v. *Maryland Cas. Co.*, 269 Mass. 75, 94.

II.

Answering Point II.

The respondents were not liable by contract for interest on the mortgage, taxes and premiums, because their bond did not guarantee the payment of such items. The respondents' sole obligation was to make good any default of their principal in constructing, paying for and completing the building.

This claim of the petitioner that the provisions of the respondents' bond obligated the respondents to pay interest on mortgage, taxes and insurance premiums would seem to be controverted by petitioner's own prior, practical interpretation of the instruments. The default in the completion of the building occurred on December 16, 1930. The action herein was instituted on or about February 18, 1932. Between these two dates there were numerous communications between the petitioner and the respondents. Detailed lists of damages claimed were delivered to the respondents by the petitioner. (Plaintiff's Exhibits 60, 62, 66, 70, 71, 72, R. pp. 730, 732, 739, 744, 745, 752.) In none of these communications was any claim made for interest on mortgage, taxes or insurance premiums, nor was any claim made in the complaint that the respondents were obligated by contract to pay interest, taxes or premiums. The long, detailed complaint alleged the only defaults were defaults in constructing, paying for and completing the building. When the concluding paragraph of the complaint claimed

interest, taxes and insurance, it claimed them only because they were damages flowing from the failure to complete the building, not flowing from the failure to comply with an obligation to pay such items (R. pp. 13-18).

Under the circumstances, it is hardly open to the petitioner to claim that there was any written obligation on the part of the respondents to pay such items. But apart from the practical construction placed upon the respondents' bond by the petitioner, the only reasonable construction of the instruments in suit is that respondents were not liable by contract for the payment of interest, taxes and premiums.

All the instruments in suit which evidenced the relations between plaintiff and Central Park Properties, Inc., show clearly that the latter assumed two separate obligations; first, the repayment of the principal of a loan in the sum of $6,650,000, with interest; second, the construction and completion of a building in accordance with the terms of the building loan agreement and plans and specifications.

That the petitioner fully understood that there were two separate obligations is shown by the fact that it sought and obtained a guaranty of performance of the bond and mortgage from one Lefcourt (R. pp. 571, 578, 679).

Lefcourt's guaranty covered both of the obligations mentioned,—payment of principal and interest and completion of the building,—while the surety bond executed by these respondents covered only the latter obligation, the completion of the building.

Lefcourt's collateral bond (Plaintiff's Exhibit 10) in express terms guaranteed the performance of the provisions of the bond and mortgage, including payment of principal and interest.

When we now turn to the respondents' bond (Plaintiff's Exhibit 2) we notice the absence of any language like the language used in the Lefcourt guaranty for the payment of principal and interest and for the performance of the bond and mortgage.

The condition of the bond was that it will be void: if the principal shall proceed with the *construction and completion of the building* so that it shall be constructed and completed in accordance with the building loan agreement and the plans and specifications, and ready for occupancy not later than December 16, 1930, free and clear of liens (among which is not plaintiff's mortgage) (R. pp. 595, 596); if the principal shall pay the cost of the *erection, construction and completion* (R. p. 596); if the surety shall indemnify the obligee from *loss or damage caused by the failure to construct, pay for and complete the building* (R. p. 596); if the surety shall make good any default *in constructing, paying for and completing* the building and shall make good every other default by the principal in performing any of the other terms set forth *in the building loan agreement* to be kept and performed by the principal up to and including the completion of and payment for the building in accordance with the building loan agreement and plans and specifications, and shall indemnify the obligee against loss and damage suffered by the obligee in making good any default of the principal (R. pp. 596, 597).

There is no condition express or implied respecting payment of the principal of or the interest on the loan, taxes or premiums. The building loan agreement specifically provided that the bond was to guarantee the completion of the building, not the payment of principal or interest of the loan, taxes or premiums. The recital in the bond itself

is that it was to guarantee the completion of the building, not the performance of the bond and mortgage.

As said in *United Real Estate Co.* v. *McDonald,* 140 Mo. 605, cited with approval in *Trainor* v. *Aetna Casualty,* 290 U. S. 47:

> "The condition of the bond is not that McDonald's notes should be paid but that the house should be built."
>
> *Province Securities Corp.* v. *Maryland Cas. Co.,* 269 Mass. 75, 94;
> *McCauslan* v. *Zoar Holding Co.,* 131 Misc. 148, 150.

It is well settled that the obligation of the surety is not to be extended to any other subject, person or period of time or liability than is expressed or necessarily included in it.

> *Smith* v. *Molleson,* 148 N. Y. 241, 246;
> Sutherland on *Damages* (4th Ed.), Sec. 725.

Reading the building loan agreement and the bond together, only one reasonable conclusion is possible and that is that the respondents' bond was a guaranty only of the completion of the building. That is exactly what both the building loan agreement and the bond said.

Petitioner has apparently now discarded the argument made by the Trial Court for the inclusion of interest, taxes and insurance premiums in the damages, and argues that these items were payable because of provisions other than those relied upon by the Trial Court.

Its first argument is, in brief, that since the respondents' bond agreed to make good any default by the principal in performing any of the terms, covenants or conditions of the building loan agreement, and the principal in the building loan agreement agreed to perform the cove-

nants, terms and conditions of the bond and mortgage, the respondents thereby became liable for the performance of the covenants, terms and conditions contained in the bond and mortgage. If such construction were possible, then the respondents would have been liable for the principal of the loan up to the amount of their bond, although the amount of the bond was less than half of the amount of the loan and was given for the purpose of guaranteeing the completion of the building. If the petitioner intended to make the respondents liable for the performance of the bond and mortgage, it should have used explicit language to that effect. When petitioner sought a guaranty not only of the provisions of the building loan agreement but of the provisions of the bond and mortgage from Lefcourt, it did so without any uncertainty in language. Lefcourt guaranteed the performance of the provisions of all these instruments. The respondents guaranteed only the performance of the provisions in the building loan agreement.

What the petitioner is endeavoring to do is to import into the building loan agreement the covenants and provisions of the bond and mortgage, so as to make the respondents liable for the performance of the provisions of the bond and mortgage, when they agreed only to be bound for the performance of the provisions of the building loan agreement.

As to insurance, the petitioner relies on part of Paragraph Fourteenth of the building loan agreement. Although the petitioner states that this provision requires the principal to pay premiums, it does nothing of the kind, as an examination of the paragraph will disclose. The paragraph simply requires the borrower to place all insurance through a designated insurance broker (R. pp. 580, 581).

As to taxes, petitioner claims that the respondents' bond guarantees completion free from all liens, that taxes are a lien, and that, therefore, respondents are obliged to pay the

taxes. Again the petitioner has failed to call the Court's attention to the whole of the provision relied upon. The provision apparently relied upon is contained in the condition of the bond providing for the completion of the building "free and clear of and from any and all mechanics' or material men's liens or other liens, claims of architects, conditional sale contracts, chattel mortgages and charges for work and labor performed or for materials, machinery, fixtures, refrigerating units, appliances, or equipment used, or installed in or about the said building, and any municipal violations against said premises and the improvements thereon" (R. p. 596). It is apparent that the liens referred to are liens arising out of the performance of the work necessary for the completion of the building. Under well settled rules of construction the "other" liens spoken of are liens of the same nature as the specific liens mentioned.

Bers v. *Erie R. R. Co.*, 225 N. Y. 543, 546;
Matter of Hermance, 71 N. Y. 481, 487.

III.

Answering Point III.

Whether the respondents were liable for interest on mortgage, taxes and insurance premiums was a question of law determinable from a construction of the respondents' bond, and the Trial Court made no finding of fact in respect thereof.

Petitioner makes the unwarranted statement on page 31 that respondents on the trial did not dispute the fact that these items were damages contemplated to result from a failure to complete the building. A reading of the Trial Court's opinion will show that the respondents bitterly contested the contention.

No evidence was adduced by the petitioner in respect of these items other than that it received no interest on

the principal of the loan from the date of the default; that it paid taxes covering the period after the date of the default; and that it paid insurance premiums for the same period.

The petitioner claims that when the Trial Court found from a consideration of the instruments that the respondents were liable for these items, thereby the Trial Court made a finding of fact, with evidence to support it. Obviously, a conclusion reached from the construction of written instruments is not a determination of fact. The construction and effect of written instruments is a question of law.

Swift v. *Hocking Valley R. Co.*, 243 U. S. 281, 289;
Dillon v. *Barnard*, 21 Wall. 430, 437;
Hamilton v. *Liverpool, etc. Ins. Co.*, 136 U. S. 242.

Therefore, the cases cited by petitioner which hold that the direction of a verdict is conclusive upon all issues of fact have no application. Necessarily, before such cases could have application, there would have to be a dispute of fact as to these items, and the only dispute was one of law based upon the interpretation of the written instruments.

The claim that the parties must have had in mind cases where interest on investment may be considered for the purpose of arriving at a fair return on the money is without force.

In this case the petitioner kept as far away as possible from a determination of the value of the property and a determination of the capital investment in the property for the purpose of determining loss. Even assuming that interest and taxes might enter into a determination of the investment of the petitioner, if the value of the property was equal to the amount of that investment, the petitioner

could under no circumstances recover damages. Respondents did not guarantee anything other than losses sustained. Therefore, the talk about capital investment and the items entering into capital investment, when there is nothing in the record to show loss of capital investment, is to inject matters which were never before considered.

Again the claim is made that the parties must have contemplated that when the building was erected it would rent for more than enough to pay interest, taxes and premiums. It is sufficient to say in respect of rent and rentability that such questions were not in this case, as was pointed out by the Circuit Court of Appeals in its opinion (R. p. 884).

IV.

Answering Point IV.

The Circuit Court of Appeals was not confused in its holding that the provision in the bond for written waiver of strict performance of the building loan agreement could be waived by the parol consent of the president of the petitioner to omissions and substitutions.

If we understand the argument of petitioner, it is that the evidence excluded tended to show a waiver of the provisions of the building loan agreement, and did not tend to show a waiver of the provision in the bond that any waiver of the provisions of the building loan agreement must be in writing, and that, consequently, when the Circuit Court of Appeals stated that the evidence excluded would tend to establish a waiver of the requirement in the bond for a written waiver, it misconceived the instrument which

it is claimed was changed. This argument seems to lose sight of the fact that evidence competent to establish a waiver of strict performance of the building loan agreement would be competent to establish a waiver of strict performance of the bond of the respondents, because the bond guaranteed the performance of the provisions of the building loan agreement.

The theory upon which the petitioner sought damages for omissions and substitutions was that the principal had made these omissions and substitutions contrary to the terms of the building loan agreement. Respondents pleaded in their answer that the omissions and substitutions claimed as items of damage were made with the knowledge and approval of the petitioner, and that as to such items there was a waiver of strict performance of the building loan agreement (R. p. 55).

The building loan agreement specifically recognized that there might be a waiver of the strict performance of the building loan agreement when it provided that the failure to require strict performance in any one or more instances of the terms of the building loan agreement should not be construed as a waiver for the future of any such terms (R. p. 55). There was no provision in that agreement requiring any such waiver to be in writing. However, there was a provision in the respondents' bond to the effect that any waiver of a default in complying with the building loan agreement, the plans or specifications, or the bond itself should be in writing signed by an officer (R. p. 604).

Naturally, if a waiver of strict performance could have been established, no liability would attach against the respondents for omissions and substitutions consented to, because their bond did not impose any greater liability upon them than was imposed upon their principal. Whatever acts of the petitioner would relieve the principal of liability

under the building loan agreement would likewise relieve the respondents of liability under their bond as to the same matters.

Upon the trial the respondents endeavored to adduce testimony that the president of the petitioner consented by parol to certain omissions and substitutions. As stated above, such consent, if effective, would accomplish a change in the principal's obligations under the building loan agreement and the respondents' obligations under the bond. Objection was made to the offer of proof because the consent or waiver to be proved was a parol one and not in writing, as provided by the bond. The testimony was excluded because of that specific objection, the Court holding that a parol consent or waiver could not be established (R. pp. 213, 214).

Strictly speaking, the evidence excluded was offered to establish a waiver of strict performance of the building loan agreement. That is the very fact which the respondents would have to establish in order to avoid liability on account of omissions and substitutions. Proof of a waiver of the provision that waivers should be in writing in and of itself would be ineffective without proof of a waiver of the building loan agreement.

The objection to the testimony offered was not the objection now raised, that it would not tend to show a waiver of the provision of the bond, but the objection was that a waiver of the provisions of the building loan agreement could not be proven by parol.

We are uncertain whether petitioner argues that the provision for written waiver had greater weight because it was contained in the bond rather than in the building loan agreement. If so, the argument would seem to be without weight. If the provision for a written waiver had been in the building loan agreement and not in the bond, the respon-

dents would have been bound by such provision in the same manner as they were bound by all the other provisions in the building loan agreement. If such a provision in the building loan agreement could be waived, the same provision in the bond could be waived.

V.

Answering Point V.

A provision in an instrument requiring a written waiver may be waived by parol, and the excluded evidence tended to show such waiver.

The respondents upon the trial endeavored to show that the president of the petitioner was familiar with certain omissions and substitutions and consented thereto. Objection was made upon the ground that there could be no waiver except in writing, and the Court sustained the objection (R. pp. 213, 214). No objection was made that there was no preliminary showing of the general authority of the president or that the testimony sought to be adduced would not tend to show a waiver, the objections now advanced for the first time. Objection was based solely upon the ground that there could be no parol waiver, and respondents were prevented from proceeding further because of that objection.

We submit that the Trial Court misconceived the law and that the Circuit Court of Appeals was correct in its determination that even a provision against parol waiver might itself be waived. All recognized authority is to the effect that a provision requiring any waiver to be in writing may itself be waived by parol. As Judge Cardozo said in *Beatty* v. *Guggenheim Exploration Co.*, 225 N. Y. 380, 387:

"Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. 'Every such agreement is ended by the new one which contradicts it.' (*Westchester F. Ins. Co.* v. *Earle*, 33 Mich. 143, 153). What is excluded by one act, is restored by another. You may put it out of the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again (*Pechner* v. *Phoenix Ins. Co.*, 65 N. Y. 195, 204, 205; *Solomon* v. *Vallette*, 152 N. Y. 147, 151; *F. F. Ins. Co.* v. *Norwood*, 69 Fed. Rep. 71; *McElroy* v. *B. A. Assur. Co.*, 94 Fed. Rep. 990; *Westchester F. Ins. Co.* v. *Earle, supra;* Ewart on the Law of Waiver, p. 286)."

Insurance Co. v. *Norton*, 96 U. S. 234, 240;
Northern Assurance Co. v. *Grand View, etc. Assn.*, 183 U. S. 308, 352, 361;
Teer v. *George A. Fuller Co.*, 30 F. (2d) 30, 32;
Steen v. *Niagara Fire Ins. Co.*, 89 N. Y. 316, 327;
General Electric Co. v. *National Contracting Co.*, 178 N. Y. 369, 375.

In the very *Traitel Marble* case cited by petitioner, which had to do with alterations in the work, and in which there was a written provision that no alterations should be made except upon written order, the Court stated:

"Unless compliance therewith was waived by the defendant, the provision that there should be no change in the work as fixed by the specifications, except upon the written order of the architect, was controlling (*Langley* v. *Rouss*, 185 N. Y. 201). *Such waiver might have been by writing or by conduct.*"

When petitioner quoted from *Langley* v. *Rouss*, 185 N. Y. 201, it failed to quote that part of the opinion which

is applicable here. That case pointed out the difference in a contract which limits the authority of the architect and a contract providing that the contractor shall not be paid for alterations unless the same are ordered in writing by the owner. As to the latter type of contract, the Court said:

> "A party to a building or other contract can waive a provision therein inserted for his benefit."

VI.

The Circuit Court of Appeals was correct in ordering a new trial.

The petitioner makes the point that the only fact which would require a new trial was the exclusion of evidence, and that if such exclusion was proper no new trial was required.

Without arguing the point as to when the Circuit Court of Appeals may make a final determination, it is obvious from a reading of the opinion of the Circuit Court of Appeals that a new trial was absolutely necessary in order that any damages might be fixed in accordance with the proper rules.

The Circuit Court of Appeals held that the proper measure of damages was the difference in value between an incomplete and complete building (R. p. 882). No evidence was offered at the trial to show what that difference, if any, was.

The Circuit Court of Appeals held that recovery might be had for any loss sustained by reason of omissions and substitutions, but that such loss would be the amount by which the value of the building was lessened (R. pp. 882, 884). There was no evidence offered upon the trial to show that there was any such loss, although the respondents

offered evidence that the omissions and substitutions did not decrease the value of the building. Under the circumstances, before petitioner could recover for omissions and substitutions, it would have to adduce testimony to show decrease in value of the building.

The items of omissions and substitutions were of importance, as shown by the fact that the Trial Court allowed as damages $160,842.28 for omissions and substitutions (R. p. 516). Since these items were never installed or corrected, it would have been improper to allow recovery therefor by showing what it would have originally cost to install them in the manner required. The true measure of damage is, as pointed out by the Circuit Court of Appeals, the decreased value of the building by reason of such omissions and substitutions and there is no evidence in the record of such decreased value.

Conclusion.

The petition should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1935.

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Respondents.

No. 270.

BRIEF FOR RESPONDENTS.

THOMAS E. WHITE,
Counsel for Respondents.

JOHN W. DAVIS,
JOSEPH F. MURRAY,
THOMAS E. WHITE,
Of Counsel.

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THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Respondents.

No. 270.

BRIEF FOR RESPONDENTS.

Scope of Review.

This Court has granted certiorari to consider the measure of damages to be applied in an action brought by a mortgagee (here the petitioner) against sureties (here the respondents) on the bond of the latter guaranteeing completion of a building, for damages arising out of failure to complete the building, where the principal-mortgagor has also defaulted on the mortgage.

Damages Claimed by Petitioner.

The petitioner did not ask generally for damages, but asked specifically for three items of damage: First, expenditures alleged to have been made by it in completing the building though the greater part of the alleged period used for completion was after petitioner had become owner